Because local carriers such as Verizon were not permitted to provide service across LATAs, such calls, even though they were originated by the local telephone company, had to be handed off to a long-distance carrier for completion to the interLATA FX customer. As such, Verizon argues that the FCC squarely resolved the question of appropriate intercarrier compensation (*i.e.*, access charges) for such calls.[38] Verizon argues that despite the fact that interLATA calls are locally dialed, they are interexchange calls that are subject to access charges rather than reciprocal compensation.

Verizon argues that the same reasoning must apply to intraLATA calls. Verizon contends that since the assignment of phone numbers is easily manipulated and reflects nothing about underlying costs, intercarrier compensation payments must be governed by the actual physical location of the parties and the path of the call and not by the telephone number that the carriers choose to assign to the end-user, as argued by US LEC. (VZ Exc., p. 19; Haynes Rebuttal, 11:16-12:6.).

Verizon also objects to the ALJ's reference to the fact that Verizon may have charged reciprocal compensation for CLEC-originated traffic that Verizon has delivered to its FX (and FX-type) customers in the past. Verizon argues that the focus should be about what is the proper resolution of the issue presented here. Regardless of past practice, Verizon claims that under its proposal in this proceeding, all traffic – both Verizon-originated and CLEC-originated – would be subject to reciprocal compensation based on the physical location of the called party and not the assigned telephone number. (VZ Exc., pp. 19-21).

Verizon's theory that adoption of the ALJ recommendation would contribute to regulatory arbitrage is as follows: when a US LEC customer subscribes to a

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[38] *See* Haynes Direct at 7:15-8:22 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶ 71 (1998) (Verizon App. Tab 1), *recon. denied*, 15 FCC Rcd 7467 (2000)).

VNXX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party.[39] Verizon concedes that there is nothing necessarily wrong with that, so long as US LEC appropriately compensates Verizon for the service that Verizon continues to provide. Verizon claims that it would be inconsistent with regulatory policy and basic fairness to require Verizon to *pay* reciprocal compensation to US LEC, when Verizon continues to bear the same costs of originating and transporting the interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers. (VZ Exc., p. 21).

Verizon continues to explain that US LEC charges its VNXX customers a $500 fixed charge and $1000 per month in Pennsylvania, with additional charges added on. Yet, states Verizon, US LEC provided no evidence that it incurs any additional costs in providing VNXX service as compared to ordinary local exchange service. (VZ Exc., p. 22).[40]

Verizon notes that US LEC justifies its VNXX charges purely on the basis of the subscriber's ability to receive calls from parties located in a foreign exchange without those calling parties incurring any toll charge. As such, Verizon submits that US LEC explicitly informs its FX subscribers that they are paying those toll charges through their payments to US LEC. Verizon asserts that those "toll charges" that US LEC requires its subscribers to pay in order to receive FX service are precisely those toll charges that Verizon does not receive because of US LEC's manipulation of number assignments.[41] At the same time, Verizon argues that US LEC insists that Verizon should

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39 *See* US LEC's "Enhanced Local Services," at 2 (Hearing Exh. VZ-6) (US LEC describing "Foreign exchange" as involving "an inbound-only call, toll-free to the calling party, which is paid for by the called party").

40 *See* Tr. 175:17-19.

41 Haynes Rebuttal, pp. 12:4-5.

be required to deliver traffic originated LATA-wide to its switch. In that arrangement, Verizon complains it is bearing the cost of originating a call and transporting it across the LATA – the very interexchange service for which US LEC is being paid by its customer, and for which Verizon is no longer being paid by its customer.[42] (VZ Exc., pp. 22-23).

Verizon contends that under these circumstances, US LEC should compensate Verizon for the services that it continues to provide – *i.e.*, Verizon should continue to receive at least a portion of the toll charges that it would otherwise receive from its customer in the form of access charges paid by US LEC. By the same token, Verizon has offered that if a US LEC customer originates a call to a Verizon FX customer, Verizon should pay intrastate access charges.[43] (VZ Exc., p. 23).

iii. Identification of VNXX Traffic

Finally, Verizon notes that, contrary to the ALJ's view, the record in this proceeding does establish that FX and VNXX traffic can be practically distinguished from local traffic for intercarrier compensation purposes. Verizon argues that there need not be any significant problems with implementing its proposal because a practical method for distinguishing FX and VNXX traffic from traffic that is subject to reciprocal compensation has already been proposed in other states and could, inexpensively, be implemented in Pennsylvania. Verizon explains that the record demonstrates that this could be accomplished simply and inexpensively by requiring US LEC to conduct a traffic study, based on an analysis of known FX and VNXX

42 Haynes Rebuttal, pp. 8:10-19.
43 Tr. 235:10-11.

numbers, to determine the proportion of calls exchanged between the Parties that are not subject to reciprocal compensation but that should be subject to access charges.[44]

Verizon further noted that US LEC introduced no testimony to support any claim that it would be burdensome to determine the volume of traffic that it delivers to its VNXX customers. Accordingly, Verizon is of the opinion that the record establishes unambiguously that there is no practical obstacle to implementing Verizon's proposed language. Verizon concludes that the ALJ's reliance on the factual determination of the Wireline Bureau was based on a different record and is contrary to the evidence in this proceeding and cannot be sustained. (VZ Exc., p. 26).

d. Disposition

Before we begin our analysis of this issue, it is important to stress that this disposition shall not address the merits of US LEC's use of VNXX codes in Pennsylvania to provide "FX-like" service. Verizon does not challenge the CLEC's use of VNXX and this is a consideration which is the subject of a generic investigation. *See* Docket No. I-00020093 (Initial Prehearing Conference before ALJ Paist held January 17, 2003).[45] The merits on the use of VNXX codes and compensation, will be resolved in the *VNXX Generic Investigation*, *supra*. Rather, we shall only address, based on the record evidence in this proceeding, the type of intercarrier compensation that we conclude should apply to the traffic at issue here.[46] Also, our ruling here is limited to only intrastate traffic per our decision in the *Level 3 Order*. This determination is, however, without

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44 *See* Tr. 232:10-25, 234:4-14, 236:16-240:1.

45 We note Verizon's citation of the *Focal Order* for the proposition that NXX codes should be assigned to customers that correspond with the rate centers in which the customer is physically located. (R.D., p. 41).

46 The *ISP Remand Order* has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic. Thus, our determination is limited to voice traffic only.

prejudice to this Commission's consideration of intercarrier compensation for FX-like, toll substitute, or other similar services in any forthcoming investigation.[47]

Upon our review of the record and Verizon's Exceptions, we shall modify the ALJ's recommendation on this issue, consistent with our discussion. We conclude that calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation. However, we also conclude that assessing originating access charges on those types of VNXX calls to the terminating party is not appropriate. As such, we will direct, as an interim determination, that such traffic be compensated on a "Bill and Keep" basis, unless the Parties to this Agreement propose an alternative arrangement for our approval or the Commission takes subsequent action that modifies this interim determination. *See Local Competition Order*, Para. 1111 ". . . it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances." In light of the fact that this is an issue of first impression for this Commission, and there appears to be a divergence among the state commissions and FCC Staff which have considered the issue, we conclude that although this result was not expressly advanced by either of the Parties in their Final and Best Offers, it would better implement the objectives of TA-96 under the current rules and provides appropriate conditions which should be placed upon the Parties to the proposed Agreement. This resolution shall be applicable to Verizon's interconnection agreements and not other ILECs'. As noted, Section 252(c) of TA-96, provides that "[i]n resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."

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47 Pursuant to Para. 1035 of the *Local Competition Order*, the state commissions have the authority to, *inter alia*, determine what geographic areas should be considered "local areas" for the purposes of applying reciprocal compensation obligations under Section 251(b)(5) of TA-96, 47 U.S.C. § 251(b)(5).

(Emphasis added). However, as noted, this does not foreclose the Parties to this Agreement from proposing an alternative arrangement for our approval.

As noted, US LEC argues that the Commission should adopt its language which would direct that calls are rated as local (in which case reciprocal compensation must apply under federal law) or toll (in which case reciprocal compensation would not apply) based on the NXX codes of the calling and the called parties. In other words, US LEC wants the Commission to rule that reciprocal compensation should apply to a call under circumstances where the VNXX code it assigns to the called party is in the same local calling area as the NXX code assigned to the calling party – irrespective of the physical location of the called party. At the same time, US LEC contends that access charges should apply to calls to VNXX codes only when the NXX of the caller is not associated with the same local calling area as the VNXX code.

Verizon, on the other hand, argues that the Commission should direct that calls be rated as local or toll based on the physical location of the calling and called parties. In other words, Verizon wants the Commission to rule that federal law does not require reciprocal compensation for a call when one of Verizon's customers makes a call to a CLEC's virtual NXX telephone number as the call terminates outside of the local calling area of the Verizon customer. Verizon heavily relies upon the "end-to-end" analysis used by the FCC in various related orders. Verizon asserts that the FCC has used this traditional analysis to determine the jurisdictional nature of a call as interstate. Verizon reasons that since the calling party and the called party are in different physical locations that are not part of each other's local calling area, the call must be considered "exchange access" (*i.e.*, a toll call) under federal law. Consequently, Verizon takes the added step to assert that by definition, this traffic is not subject to reciprocal compensation and must be subject to originating access charges.

Both Parties concede that the routing of calls is based on the standard industry-wide practice of utilizing NXX codes, which are associated with rate centers.[48] When a telecommunications carrier receives a NXX code from the North American Numbering Plan Administrator, the carrier assigns the NXX code to a rate center. However, the Parties disagree concerning the implications of utilizing the NXX code for call rating purposes (*i.e.*, the determination of whether a call is local or whether the caller should be charged a separate toll charge). US LEC maintains that Verizon, in its campaign to end the payment of reciprocal compensation to CLECs for VNXX calls, is seeking to alter the standard industry-wide practice of rating calls by comparing the calling party's NXX with the terminating party's NXX.[49]

We acknowledge that the telecommunications industry has historically compared the destination points (or rate centers) of NXX codes to determine the appropriate billing treatment of calls as local or toll. This method was utilized because the NPA/NXX code was generally assigned to a customer residing in the same exchange to which the NPA/NXX was homed. Consequently, the "location" of the NPA/NXX was a reasonable proxy for the actual physical location of the particular customer being called. Accordingly, it was a reasonable presumption that the result of an "end-to-end" analysis of a call and the comparison of the calling party's NXX code with the

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[48] A rate center is a geographic location identified by a vertical and horizontal coordinate within an exchange area, from which mileage measurements are determined for the application of toll rates and private line interexchange mileage rates. A rate center may have more than one NXX code, but each code is assigned to one and only one rate center. (US LEC St. 2.0, n. 8, p. 21; Verizon Witness Haynes Direct Testimony, pp. 3-4).

[49] US LEC in its Petition in footnote 21 on p. 17 states that it does not utilize "virtual NXX" service in Pennsylvania. However, in order to compete with Verizon's FX service, and to be able to offer its customers a full range of services, US LEC believes that it should be able to utilize this type of service. We note that this statement appears to be contrary to the testimony presented during the arbitration hearing. Based upon our review of the transcripts, it appears that US LEC has approximately six customers that subscribe to FX service using VNXX codes. None of those six customers are ISP customers, however. Tr., pp. 243-244.

terminating party's NXX code were consistent, as the assignment of the NXX codes corresponded with the true physical location of the customers. In other words, by comparing the NPA/NXXs of the calling and called parties, carriers were able to determine whether the call remained within the local calling area and rate it as a local call or to determine whether the NPA/NXX terminated outside of the local calling area and rate it as a toll call. As a result, carriers could rate the call accurately.

However, this presumption is no longer valid in an environment where NPA/NXXs are disassociated from the rate centers to which they are homed and we are not convinced that US LEC's arguments that the industry-wide practice of rating a call based upon its assigned NXX is viable under the recent phenomena of VNXX. Although the calls that are made to VNXX telephone numbers appear to be local to the end-user caller, the location of the calling and called parties leads us to conclude that they are in the nature of interexchange calls that TA-96 would remove from reciprocal compensation obligations. Based on an "end-to-end" analysis of a VNXX call, the physical locations of the caller and called party are in two different exchanges that may not be local to each other. As a result, we are of the opinion that calls to VNXX telephone numbers should not be subject to reciprocal compensation.

The Commission believes that the intercarrier compensation for calls utilizing virtual NXX/FX codes should be based upon the end points of the call, rather than upon the NPA/NXX assigned to the calling and called parties. As noted by the FCC, it has traditionally determined the jurisdictional nature of a call by its origination and termination points or end points, and not by its telephone number assignment. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*), *remanded, WorldCom, Inc v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *see also Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) *(Teleconnect),* *aff'd sub. nom. Southwestern Bell Tel. Co. v. FCC,* 116 F.3d 593 (D.C. Cir. 1997); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation,* 7 FCC Rcd 1619 (1992) (*Bell South Memory Call*), *aff'd, Georgia Pub. Serv. Comm'n v. FCC,* 5 F.3d 1499 (11th Cir. 1993); *see generally, Mountain Communications; AT&T Corp. v. Bell Atlantic-Pennsylvania,* 14 FCC Rcd 556 (1998), *recon. denied,* 15 FCC Rcd 7467 (2000).

The Commission acknowledges that pursuant to the end-to-end analysis used by the FCC, the VNXX traffic in question would not be considered local under the current interpretation of TA-96 as the traffic terminates outside of the local calling area of the calling party (ILEC customer). The FCC's regulations require reciprocal compensation only for the transport and termination of traffic "that originates and terminates within a local calling area established by a state commission." 47 C.F.R. §51.701(a)-(b)(1). Since VNXX traffic does not originate and terminate in the same rate center or local exchanges, we conclude that VNXX FX traffic is not subject to reciprocal compensation.

We are also in agreement with several aspects of the Florida Public Service Commission's (PSC) reasoning concerning this issue. The Florida PSC concluded that the appropriate intercarrier compensation should be determined by the physical origination and termination of a call:

> We believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. We believe this is true regardless of whether a call is rated as local for the originating end user (*e.g.*, 1-800 service is toll traffic even though the originating customer does not pay the toll charges). We acknowledge that an ILEC's costs in originating a virtual NXX call do not necessarily differ from the costs incurred originating a normal local call. However, we do not believe that a call is determined to be local or toll based upon the ILEC's costs in originating the call. In addition, we do not believe that the proper application of a

> particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in delivering a call, but rather upon the jurisdiction of a call as being either local or long distance.
>
> This raises the issue of whether reciprocal compensation or access charges should be applied to virtual NXX/FX traffic. We agree with BellSouth witness Ruscilli that calls to virtual NXX customers located outside of the local calling area to which the NPA/NXX is assigned are not local calls for purposes of reciprocal compensation. As such, we believe that they are not subject to reciprocal compensation. ...

The Florida Commission further noted that, although its conclusion created a default for determining intercarrier compensation, it did not mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Rather, the Florida PSC determined that it would be appropriate and best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual Interconnection Agreements.[50]

Notwithstanding that we conclude that VNXX should not be subject to reciprocal compensation, at this time, we also conclude that Verizon's position regarding the imposition of originating access charges on VNXX traffic is not appropriate based on this record. We are mindful of the Illinois Commerce Commission which considered the issue and noted the following: "As Verizon recognizes, it will incur no more additional cost for transporting a virtual NXX call to the POI than it does for transporting any other

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[50] The Florida Commission concluded: (1) that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed (as noted, we are not making a determination on this issue in this Opinion and Order); (2) that intercarrier compensation for calls to these numbers shall be based upon the end points of the particular calls; (3) that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; and (4) that carriers shall not be obligated to pay reciprocal compensation for this traffic.

Global-bound local call to the POI, and we have already found that such additional cost will be trivial." *See Global NAPs, Illinois Petition for Arbitration Pursuant to Section 252(b) . . . with Verizon North, Inc. . . .*; 2002 Ill. PUC LEXIS 946 (*Global Ill Order*) (note omitted). As in the Illinois case, both Parties to the instant arbitration admit: (1) that calls to FX customers are indistinguishable from other local calls (Tr., pp. 194-195); (2) that an FX call is handled and routed the same as any other local call (Tr., p. 228); and (3) that the physical location of the terminating party has no impact on the costs it incurs to transport a call. (Haynes Rebuttal, p. 12).

Based on the foregoing, the position of US LEC regarding the increased costs to Verizon is well-taken. Verizon's request for originating access for VNXX does not appear justified based on cost incurrence principles. On the contrary, it appears, based on this record, that the cost to Verizon to deliver traffic to US LEC's POI is the same for an ordinary local call as for a call to a VNXX telephone number. Verizon's network facilities associated with its intraLATA toll facilities do not appear to be taxed differently in any perceptible way for ordinary local traffic, as compared to VNXX traffic. Thus, the basis of Verizon's harm would appear to be alleged lost toll revenues. And, Verizon's entitlement to these foregone toll revenues is primarily based on its position that current rules define what occurs with VNXX as interexchange toll.

At present, we are concerned about the effect of requiring originating access charges on VNXX traffic where it has not been shown, on this record, that originating access charges are appropriate. As noted by the Illinois Commerce Commission, which relied, in part, on the reasoning and analysis of *Essex Telcom, Inc. -vs- Gallatin River Communications*, L.L.C, 2002 Ill PUC LEXIS 703 (2002), Verizon's proposal for originating access is administratively problematic, as well as unrelated to cost incurrence principles. In the *Global Illinois Order*, it was noted that Verizon's automated recording systems are not able to recognize virtual NXX calls for the purpose of assessing originating access charges on this traffic; Verizon's request for distinguishing virtual NXX calls was applicable for a *single* CLEC but not for the multiple CLECs that could opt into the Interconnection Agreement; Verizon was silent with respect to the terminating access charges it would owe the CLEC if virtual NXX calling were treated as toll calling for intercarrier compensation purposes; and Verizon did not acknowledge that it will also receive compensation, through local service charges, from the Verizon customer that places a local call to a CLEC virtual NXX.

Furthermore, we are not convinced that the instant record provides any more workable solution to the ability of Verizon to properly account for VNXX traffic for this Commission's consideration of a more detailed intercarrier compensation mechanism than Verizon has presented in other jurisdictions where this issue has been litigated.[51] Similar to the considerations faced by the FCC Staff in the *VA Arbitration Order*, we are not convinced that Verizon has proposed any workable and detailed proposal for conducting a traffic study to develop a factor to account for virtual FX traffic.

ALJ Cocheres expressed his agreement with the FCC Wireline Bureau with regard to Verizon's proposal to conduct a traffic study to develop a factor to distinguish FX and VNXX traffic from traffic that is subject to reciprocal compensation. As noted, the Wireline Bureau recommended the dismissal of Verizon's proposal stating "Verizon's contract fails to lay out such a mechanism in any detail."[52] In the instant case, Verizon argues in its Exceptions, that its witness, Terry Haynes, testified in this proceeding that it is a relatively straightforward matter to conduct a traffic study, based on an analysis of known FX and VNXX numbers, to determine the proportion of calls exchanged between the parties that are not subject to reciprocal compensation but that should be subject to

[51] Verizon has argued that a proposal to account for VNXX traffic has been offered in Florida. Our review does not disclose any details of such a plan and the Florida PSC has, apparently, left it up to parties to negotiate compensation for VNXX traffic.

[52] Order at ¶302.

access charges. (VZ Exc., p. 25 citing Tr. 232:10-25, 234:4-14, 236:16-240:1). Verizon argues that if it is easy for an incumbent LEC to perform such a study on a base of three million customers, then US LEC should have no difficulty to perform a study for six VNXX customers in Pennsylvania. Verizon contends that, based on comparable evidence, the South Carolina Commission concluded that "the parties can accurately and inexpensively distinguish FX and VNXX traffic from local traffic for intercarrier compensation purposes."[53]

In the instant proceeding, Verizon's proposal to have US LEC conduct a traffic study is not materially different from that approach considered expensive and problematic in the *VA Arbitration Order*, at Para. 302. Further, the questions which arose in the *Global Illinois Order* are not answered here, as well.

Based on our concern that Verizon presents no reasonable and practical method to separate VNXX FX-type traffic from local traffic for intercarrier compensation purposes in the present case, we shall direct that the compensation be according to "Bill and Keep" until revised in any forthcoming investigation or proceeding. This resolution shall be applicable to Verizon's Interconnection Agreements and not other ILECs'.

Lastly, we believe that VNXX may provide a functionally equivalent service to Verizon's "traditional" FX service. Indeed VNXX appears to be a competitive response to FX service, which has been offered in the market by ILECs for years. As noted by ALJ Cocheres, until this proceeding, Verizon offered FX service to its current customers and collected reciprocal compensation from CLECs for terminating this traffic. (R.D., p. 38). We would agree with Verizon that there are differences between traditional FX service that has been offered by the ILECs prior to local exchange competition and the recent introduction of "functionally equivalent" FX-type service offerings that

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[53] *South Carolina Order*, p. 29.

In conclusion, we direct, in the interim, that no reciprocal compensation shall be paid for VNXX traffic between Verizon and US LEC, that Verizon shall not assess originating access charges to US LEC for VNXX calls by Verizon's customers, and that the compensation should be according to "Bill and Keep" between Verizon and US LEC, pending revision and any forthcoming investigation or proceeding.[56]

6. Issue No. 8: What compensation framework should govern the Parties' exchange and termination of ISP-bound traffic in the event the FCC's Internet Order is vacated or reversed on appeal?

a. Position of the Parties

US LEC is of the opinion that in the event that the *ISP Remand Order* is vacated or reversed on appeal, the Parties should continue to compensate each other at the rates set forth in the *ISP Remand Order* for Internet-bound traffic, but that other terms and conditions in that Order, such as growth caps and new market restrictions, be waived. (US LEC M.B., p. 47).

Verizon argued that the *ISP Remand Order* sets forth a specific intercarrier compensation regime that governs the exchange of Internet-bound traffic between Verizon and US LEC during the course of this arbitrated agreement. If there is a subsequent change of law on this point, Verizon submitted that the Parties' obligations should conform to that change pursuant to the change of law clause in the agreement. Verizon also argued that there was no basis in federal law to support the US LEC proposal and that US LEC had incorrectly interpreted the *WorldCom, Inc.* decision by seeking to eliminate the growth cap and new market provisions. (VZ M.B., pp. 40-41).

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56 *See,* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* at CC-Docket No. 96-98;

BEFORE THE BOARD OF PUBLIC UTILITIES
OF THE STATE OF NEW JERSEY
DOCKET NO. TO02060320

Petition of Global NAPs, Inc.
For Arbitration Pursuant to
Section 252 of the
Telecommunications Act of
1996 to Establish an
Interconnection Agreement
with Verizon New Jersey, Inc.,
f/k/a Bell Atlantic --
New Jersey,

FINAL DECISION

ARBITRATOR'S RECOMMENDED DECISION TO
THE STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES

INTRODUCTION & BACKGROUND

The Telecommunications Act of 1996, 47 U.S.C. 151, et. seq. (the "96 Act") sets forth a national policy framework to establish a competitive and deregulated telecommunications environment. The Act imposes on incumbent local exchange carriers ("ILECs") the duty to negotiate in good faith with carriers requesting interconnection (competitive local exchange carriers or "CLECs") the terms and conditions of agreements to fulfill their obligations under the 96 Act, including, but not limited to, their duties to provide interconnection, unbundled access, resale, collocation of facilities, number portability, dialing parity, access to rights of way and reciprocal compensation. 47 U.S.C. §251. Pursuant to the Act, Congress has delegated to the States the responsibility to resolve disputes regarding terms and conditions of interconnection agreements between telecommunication providers through mediation and arbitration, and to review and approve or reject such negotiated or arbitrated interconnection agreements. 47 U.S.C. §252(e)(1).

If the ILEC and CLEC can agree on all issues, binding agreements may be negotiated and entered into without regard to the standards set forth in subsections 251(b) and (c). 47 U.S.C. §252(a)(1).

Pursuant to the 96 Act, and during the period from the 135th to the 160th day after the date on which an ILEC receives a request for interconnection, either party to a negotiation may petition The State of New Jersey Board of Public Utilities ("BPU") to arbitrate any open issues. 47 U.S.C. §252(b)(1). The arbitrator decides the open issues and will submit that decision to the parties, which in turn will submit a completed interconnection agreement to the BPU for review.

Section 252(e) requires that all interconnection agreements, whether reached through negotiation or arbitration, be submitted to the BPU for approval. The BPU must approve or reject the agreement with written findings as to any deficiencies. 47 U.S.C. §252(e)(1).

The BPU may only reject an agreement or any portion thereof adopted by arbitration if it finds that the agreement does not meet the requirements of section 251 (the interconnection checklist), or the pricing standards set forth in subsection (d) of section 252. 47 U.S.C. §252(e)(2)(B).

In its most recent decision involving the 96 Act, the United States Supreme Court said:

> The 1996 Act both prohibits state and local regulation that impedes the provision of "telecommunications service," § 253(a), n12 and obligates incumbent carriers to allow competitors to enter their local markets, §251(c). Section 25 1(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market (a "requesting" carrier, § 251(c)(2)), may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§ 251(a) and (c)(2). At the other end of the spectrum, the statute permits an

entrant to skip construction and instead simply to buy and resell "telecommunications service," which the incumbent has a duty to sell at wholesale. §§ 251(b)(1) and (c)(4). Between these extremes, an entering competitor may choose to lease certain of an incumbent's "network elements," n13 which the incumbent has a duty to provide "on an unbundled basis" at terms that are "just, reasonable, and nondiscriminatory." § 251(c)(3). *Verizon Communications, Inc. v F.C.C.*, 535 U.S. 467, 122 S. Ct. 1646, 1662, 152 L. Ed. 2d 701,725 (2002).

In *MCI Telecommunications Corp. v Bell Atlantic-Pennsylvania,* 271 F 3d. 491, 497 (3rd. Cir. 2001), the Third Circuit said:

In passing the Telecommunications Act of 1996, Congress altered the regulatory scheme for local telephone service. The Act requires that local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law. Under the Act, the incumbent local telephone service carriers must negotiate or arbitrate agreements with competitive local carriers, allowing entering carriers either to connect their equipment to the existing network or to purchase or lease elements and services of the existing network. The terms, rates, and conditions of such arrangements are set forth in interconnection agreements established between the carriers. The state utility commissions are empowered, but not required, to review and give final approval to interconnection agreements to ensure that they comport with federal law.

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Prior to 1996, local telephone service operated as a monopoly, subject to exclusive regulation by the several states. In each local service area, the states would grant a monopoly franchise to one local exchange carrier, which owned the facilities and equipment necessary to provide telephone service. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 370, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) (Iowa Utils. I). With the Telecommunications Act of 1996, Congress fundamentally restructured local telephone markets by eliminating state-granted local service monopolies. *See id.* The Act preempts exclusive state regulation of local monopolies in favor of the competitive scheme established in 47 U.S.C. §§ 251 and 252. See AT&T Communications v. Bellsouth Telecomm. Inc., 238 F.3d 636, 641 (5th Cir.), reh'g en banc denied, 252 F.3d 437 (5th Cir. 2001) (Bellsouth).

The Act essentially requires incumbent local exchange carriers (ILECs) to share their networks and services with competitors seeking entry into the local service market. See MCI Telecomm. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 328 (7th Cir. 2000), cert. denied, 531 U.S. 1132, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001). Under the Act, a new entrant to the local telephone market, known as a competitive local exchange carrier (CLEC), is able to compete with an ILEC without having to bear the prohibitive cost of building its own telecommunications network. *See id.*

PROCEDURAL HISTORY

After negotiations in which the parties were unable to reach agreement on all issues, on June 2, 2002, Global NAPs, Inc. ("Global"), filed its verified petition for arbitration pursuant to section 252(b)(1) of the 96 Act. On July 1, 2002, Verizon New Jersey, Inc. ("Verizon") filed its response to Global's verified petition. Pursuant to the procedures adopted on August 15, 1996, by BPU in its Telecommunications Order, Docket No. TX96070540, Alvin Weiss, Esq., was appointed as arbitrator to make recommendations to the BPU on the open issues in dispute between Global and Verizon.

On July 12, 2002 a prehearing conference was held by the arbitrator with both parties. At the prehearing conference, the procedure to be followed in the arbitration was established.

On August 5, 2002 Global filed a motion for partial summary judgment on four issues related to intercarrier compensation. Verizon responded to the motion on August 15, 2002.

On August 13, 2002 Global prefiled the direct testimony of William Jerry Rooney and Lee L. Selwyn. On August 13, 2002 Verizon prefiled the direct testimony of Donald Albert, P. D'Amico, Karen Fleming, William Monsel, Jonathan Smith and Harold West, III. On August 20, 2002 Verizon prefiled rebuttal testimony of Kevin C. Collins, Karen Fleming, Jonathan B. Smith and Harold E. West.

On August 23, 2002 Verizon filed motions to strike portions of the testimonies of Global's witnesses William J. Rooney and Lee L. Selwyn.

On August 28, 2002 the arbitration hearing took place. As arbitrator, I heard Global's motion for partial summary judgment and after listening to the argument, reserved decision pending the outcome of the testimony to be heard. On Verizon's motion to strike portions of the testimony of William J. Rooney, after hearing argument, I granted Verizon's motion. On Verizon's motion to strike three portions of Dr. Selwyn's testimony, I made the following ruling:

On Issue No. 1 where Verizon moved to strike what Dr. Selwyn put forth as his cost analysis of Verizon's increased transportation operation as a result of Global's interconnection with Verizon, I denied the motion.

On Issue No. 2 relating to the history regarding reciprocal compensation, I denied the motion.

On Issue No. 3 where Dr. Selwyn's testimony addressed reciprocal compensation that he thought should be in effect if the ISP Remand Order was not effective, I granted the motion on the grounds that I was bound by the ISP Remand Order.

After disposing of the pending motions, I then heard oral testimony from Dr. Selwyn, Peter D'Amico, Kevin C. Collins and Harold West. In addition, the prefiled testimony, to the extent not covered by my granting portions of Verizon's motions to strike, was admitted into evidence.

After hearing all the testimony, the hearing was closed and a schedule for filing post hearing submissions was adopted. On October 3, 2002 Global and Verizon filed their post hearing briefs. On October 15, 2002 Global and Verizon filed their reply briefs.

On February 6, 2003, I forwarded my Interim Decision to Global, Verizon and the secretary to the BPU. Verizon filed Exceptions to my Interim Decision on February 19, 2003, in which they requested reconsideration of my recommendations on Issues 2 and 7. Global notified all concerned parties that it would not be filing a request for reconsideration at that time.

On February 20, 2003 the Federal Communications Commission ("FCC") adopted "New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers" (Docket No: CC

01-338). The newly adopted rules, together with the press statements by the various commissioners, were reviewed by me.

After reviewing Verizon's Exceptions to Interim Decision and the newly adopted rules by the FCC, I have modified my initial recommendations as to Issue 7, but have retained my initial recommendations as to Issue 2.

The issues raised in this arbitration have been raised before in other jurisdictions. In many of the proceedings in the other jurisdictions, Global and Verizon were the parties involved. Because I recognized that my recommendations may be appealed or challenged by either or both of the parties when the Board hears this matter, I am not going to repeat all the contentions of the parties with respect to each issue because those very same contentions will be presented to the BPU. Rather, I will attempt to streamline the decision by setting forth each of the issues and my recommendations with respect to those issues.

ISSUE 1. SHOULD EITHER PARTY BE REQUIRED TO INSTALL MORE THAN ONE POINT OF INTERCONNECTION PER LATA.

The first issue concerns whether Global may be required to physically interconnect with Verizon at more than one point on Verizon's existing network. As recognized by Verizon, the 96 Act permits a CLEC to interconnect with an ILCEC at any single, technically feasible point in the ILCEC's network. Section 252(c)(2)(B) of the 96 Act.

The concern of Verizon is that the contract language proposed by Global could be construed in a manner inconsistent with applicable law and rules of the F.C.C. Thus, under Global's proposed Glossary §2.66, POI is defined as the meaning stated in 47 CFR §51.319(b) which is the F.C.C.'s rule defining network interface device. In addition, Global's proposed Interconnection Attachment §2.1.1 does not explicitly limit Global's choice of the POI to any "technically feasible point within Verizon's network", which is required by Section 251(c)(2) of the 96 Act.

Arbitrator's Recommendation

I recommend that the language in Section 2.67, POI (Point of Intersection), and Interconnection Attachment Section 2.1 proposed by Verizon be adopted.

ISSUE 2. SHOULD EACH PARTY BE RESPONSIBLE FOR THE COSTS ASSOCIATED WITH TRANSPORTING TELECOMMUNICATIONS TRAFFIC TO THE SINGLE POI.

Global asserts that Verizon should be responsible for the costs associated with transporting traffic on its network to the Global point of interconnection ("POI"). In support of its position, Global argues that federal law prohibits the imposition of originating charges or access charges on reciprocal compensation traffic and, that as a matter of public policy, each party should be responsible for the costs associated with transporting its own traffic to the POI. Any increase in cost to Verizon for having to transport its own traffic to the POI would be *de minimus*.

Verizon, on the other hand, argues that Global should be financially responsible for the additional transportation costs beyond Verizon's local calling area to the single POI. Verizon's proposal is premised on Global's choice to deploy fewer switches and relying more on transport on Verizon's network to serve Global's customers. Under Verizon's proposal, it would establish virtual geographically relevant interconnection point ("VGRIP") which differentiates between the physical POI Global selects and a point on the network where financial responsibility for the call changes hands. Verizon refers to this demarcation of financial responsibility as the interconnection point ("IP"). Under Verizon's VGRIP proposal, Global may choose to establish an IP or it may take financial responsibility for the traffic at the "virtual" IP location while still using Verizon's network to take the traffic all the way to the POI.

With the first option, Global must choose the location of its IPs. Global IPs must be geographically relevant to the telephone numbers it chooses to assign to its customers, but Global has several options. The Global IPs may be located at either (i) a Verizon tandem wire center in a multi-tandem LATA, or (ii) at a Verizon end office that will serve as the IP for that local calling area. Once Global has selected the location and configuration of its IP, Global has the choice to (i) purchase transport from Verizon, (ii) self-provision the transport to its switch, or (iii) purchase transport from a third party.

Under the second "virtual" IP VGRIP option, if Global chooses not to establish an IP at the Verizon tandem or at the Verizon end office at which Global collocates, the financial demarcation point—in this case a "virtual IP"—would be at the end office serving the Verizon customer who places the call. Verizon will then transport this traffic from the Verizon customer to the POI. Financial responsibility will still transfer to Global at the "virtual" IP. Global must pay Verizon for the transport from the virtual IP to the POI.

As pointed out by both parties, this issue has been dealt with by other Boards and has resulted in inconsistent decisions. Although the FCC has requested comment on this question, to date it has not promulgated any regulation dealing with this issue.

<u>Arbitrator's Recommendation</u>

The 96 Act requires an ILEC to provide for interconnection "at any technically feasible point within the carrier's network" that is "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection" "on rates, terms and conditions that are just reasonable and

nondiscriminatory". Since one of the purposes of the 96 Act was to encourage competition, and in the absence of any definitive ruling by the FCC, Global is entitled to choose a single POI in each LATA at any technically feasible point. Although Verizon's position concerning costs is a legitimate one, the adoption of Verizon's proposal would in effect constitute an impairment upon Global for electing a single POI, thus, increasing the cost of the single POI to Global and making it more difficult for a CLEC to enter the market of an ILEC. I did not find any convincing evidence that the cost of requiring Verizon and Global to be responsible financially for the traffic on its side of the POI would be more than de minimus.

I recommend that the language proposed by Verizon in section 2.46 and the language proposed by Global in section 7.1, 7.1.1.1 and 7.1.1.2 of the Interconnection Attachment be adopted.

ISSUE 3. SHOULD VERIZON'S LOCAL CALLING AREA BOUNDARIES BE IMPOSED ON GLOBAL, OR MAY GLOBAL BROADLY DEFINE ITS OWN LOCAL CALLING AREAS.

Global asserts that it should be permitted to broadly define its own local calling areas without imposition of access charges. It asserts that LATA-wide local calling areas imposed no additional costs on the ILEC outside of origination charges. It is Verizon's position that in New Jersey the BPU has approved local calling areas in determining what traffic is subject to toll or access charges. Verizon further states that Global is free to define its "local calling area" whether that be LATA-wide or something smaller but is not free to alter intercarrier compensation by its unilateral declaration of its marketing plan.

Arbitrator's Recommendation

I recommend that Global be allowed to establish state wide or LATA-wide local calling areas for its customers. However, regardless of the retail calling options Global offers its customers, I see no reason to change the existing way in which local calling areas have been defined by the BPU with the resulting intercarrier compensation based upon Verizon's current local calling areas. A carrier access charge should apply to inter LATA traffic for traffic across the boundaries of Verizon's local calling areas. To rule otherwise could amount to Verizon subsidizing Global's operations.

I recommend the language proposed by Verizon in section 2.34, 2.57, 2.76, 2.84 and 2.92 of its Glossary and sections 6.2, 7.3.3 and 7.3.4 of the Interconnection Attachment be adopted; I further recommend that language proposed by Global in section 2.47 Global's Interconnection Attachment be adopted.

ISSUE 4. CAN GLOBAL ASSIGN ITS CUSTOMERS NXX CODES THAT ARE "HOMED" IN A CENTRAL OFFICE SWITCH OUTSIDE THE LOCAL CALLING AREA IN WHICH THE CUSTOMER RESIDES.

Virtual NXX is a technology enabling carriers to establish numbers perceived by and billed to customers as local calls, regardless of the actual location of the calling center. Global asserts that linking NXXs to physical locations has been superceded by technology. Further, treating virtual NXX service differently than Verizon's FX traffic is inconsistent with Verizon's own practice of categorizing FX traffic as local. Presently, when a Verizon customer calls Verizon's FX customer, the calling party does not pay a toll charge; the customer pays the flat local rate. In addition, Global asserts that there is no ready available information that tells a carrier the physical location of a calling or called party and, therefore, there is no reason to believe that Verizon could readily obtain the information on which it proposes to rely in order to impose charges. Further, Global asserts that requiring it to pay an access charge if it employs virtual NXX to provide FX-like service would make it economically impossible for it to provide this service.

Verizon asserts that Global's proposed use of Virtual NXX assignments is a substitute toll free calling service and creates a situation in which a Verizon end user can call a Global customer outside the Verizon end user's local calling zone without paying a toll charge. This, Verizon asserts, effectively expands the Verizon end user's local calling area without providing appropriate compensation to Verizon for the transport outside the local calling area. Further, Verizon asserts that adoption of Global's proposal would make such traffic subject to reciprocal compensation based on the telephone number Global chooses to assign rather than the actual geographic end point.